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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

RONALD M. ZOBEL and PATRICIA L. ZOBEL,

Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue, and STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF ALASKA

REPLY BRIEF OF APPELLANTS

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September, 1981

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IN DISTRIBUTING STATE OWNED RESOURCES TO ITS CITIZENS ON THE BASIS OF WHEN CITIZENSHIP WAS ACQUIRED, THE STATE OF ALASKA VIOLATES THE RIGHT TO FULL AND EQUAL CITIZENSHIP INHERENT IN THE RIGHT OF INTERSTATE MIGRATION

Appellants assert that the textual source for the emerging right of interstate migration is the first sentence of the Fourteenth Amendment, creating the right of United States citizens to become citizens in the state of their choice by establishing residency, the "citizenship clause." This right to become a state citizen precludes any state from making distinctions between its citizenry solely on the basis of when their citizenship was acquired.[1] The Fourteenth Amendment

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[1]In all prior cases in which this Court has approved a durational residency requirement, that requirement has been for the purpose of providing objective indicia of the bona fides of domicile. This Court has never approved discrimination in which the classifying trait was, alone, the length of one's unquestioned citizenship. In *Sosna v. Iowa*, 419 U.S. 393 (1975), the most recent case to consider a durational residency requirement, it was made clear that the state's very legitimate and important concern over the integrity of its judgments justified imposition of the one year waiting period in order to ensure that the basis for jurisdiction, domicile, existed. *See* 419 U.S. at 407-08.

The Court in *Sosna* also observed:

> Nor are we of the view that the failure to provide an individualized determination of residency violates the Due Process Clause of the Fourteenth Amendment . . . [I]n *Vlandis* the Court warned that its decision should not "be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement."

419 U.S. at 409.

A decision in favor of appellants in this case would, similarly, in no way preclude the State of Alaska from establishing a reasonable durational residency requirement as part of the proof required to demonstrate bona fide domicile. What is a reasonable period is, itself, a constitutional question, resolution of which turns on a weighing of the importance of enjoyment of the benefit withheld against the state's interest in preventing fraudulent claims of domicile. *Compare Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), *with Vlandis v. Kline*, 412 U.S. 441, 452-53 & n. 9 (1973), and *Sosna v. Iowa*, 419 U.S. 393 (1975); *see Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

envisions equality of citizenship and not a hierarchy of citizens with long term residents at the top and new arrivals at the bottom.

The right of interstate migration, " 'freedom to enter and abide in any State in the Union,' " *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972), has at times been merged with and undifferentiated from the more general right to interstate travel. *Compare United States v. Guest*, 383 U.S. 745 (1966), *with Edwards v. California*, 314 U.S. 160 (1941). The right to enter and establish residency in a state was seen as synonymous with the right to travel through the state, and the source of the former right was thought inextricably linked to the source of the latter. See, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969).

In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), this Court explicitly noted the more specific nature of the right of interstate migration.

> [T]he right to travel was involved only in a limited sense in *Shapiro*. The Court was there concerned only with the right to migrate "with intent to settle and abide," or, as the Court put it, "to migrate, resettle, find a new job, and start a new life."

415 U.S. at 255 (footnotes omitted).

The right of migration has been considered by this Court as recently as last term, in *Jones v. Helms*, U.S. , , 101 S. Ct. 2434, 2439 (1981), in which the Court observed: "the right to travel from one state to another and to take up residence in the State of his choice is protected by the Federal Constitution." It went on, however, to sound a familiar refrain in litigation implicating the right to travel: "the textual source of this right has been the subject of debate . . ." *Id.*

The source of the right to travel has been variously identified as implicit in the nature of the federal union, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); the commerce clause, *Edwards v. California*, 314 U.S. 160 (1941); the Fourteenth

Amendment's privileges and immunities clause, as an adjunct of national citizenship, *Edwards v. California*, 314 U.S. at 178-81; 182-84 (concurring opinions of Justices Douglas and Jackson); and "liberty" protected under the Fourteenth Amendment's due process clause, *United States v. Guest*, 383 U.S. 745, 769-71 (1966) (opinion of Justice Harlan, concurring in part and dissenting in part, citing Chafee, *Three Human Rights In the Constitution of 1787*, 192-93, 209 (1956)).

Interesting, and long overlooked, is the fact that in the first case ever to identify the right of migration as a distinct federally guaranteed constitutional right this Court carefully distinguished between the right to interstate travel, on the one hand, and the right of interstate migration, on the other. In construing the newly adopted Fourteenth Amendment, at a time when its "history is fresh within the memory of us all," *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1873), the Court first identified the right to interstate travel, citing *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), as an implicit right of national citizenship protected by the Fourteenth Amendment's privileges and immunities clause. *Id.*, at 79. Justice Miller, writing for the majority, went on to note that the Fourteenth Amendment itself created a *new* substantive right, which he described as follows:

> It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.

Id. at 80.

Justice Bradley, dissenting in the *Slaughter-House Cases* on other grounds, also recognized that the Fourteenth Amendment created this new federal right to state citizenship:

> A citizen of the United States has a perfect constitutional right to go and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen . . .

83 U.S. at 112-13.

The specific textual source of this new right was identified by both Justices Miller and Bradley as the first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and *of the State wherein they reside.*" (Emphasis added.)

One recent decision of this Court has identified the source of the right of interstate migration as the right to establish state citizenship contained in the Fourteenth Amendment's first sentence. Justice Stewart, concurring and dissenting in *Oregon v. Mitchell*, 400 U.S. 112, 285 (1970), joined by Chief Justice Burger and Justice Blackmun, stated: "Freedom to travel from State to State — freedom to enter and abide in any State in the Union — is a privilege of United States citizenship." He then went on to quote the first sentence of the Fourteenth Amendment, the privileges and immunities clause, and the above-quoted statement by Justice Miller in the *Slaughter-House Cases* identifying the source of this new right as the Fourteenth Amendment's first sentence. *See Edwards v. California*, 314 U.S. 160, 182 (1941) (Justice Jackson, concurring) (semble).

Although not critical to appellants' case, recognizing the textual source of the right to interstate migration (as opposed to the more general right to travel), as the Fourteenth Amendment's first sentence is helpful in resolving the issues presented here because that sentence focuses directly on what the right of migration includes — the right to full, equal and undifferentiated citizenship in the state to which one migrates. Justice Miller, in his opinion in the *Slaughter-House Cases*, noted that this new federal grant of the power to acquire state citizenship through residency prohibited a state from establishing classes of citizenship because, he said, those claiming citizenship under the Fourteenth Amendment enjoy *"the same rights as other citizens of that state."* 83 U.S. at 80 (Emphasis added).

Later, in the same case, Justice Bradley continued:

> Citizenship of the United States ought to be, and, according to the constitution, is, a sure and undoubted title to

> equal rights in any and every State in this Union . . . If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

83 U.S. at 113.

Justice Bradley was not setting out a sweeping notion of equal protection that would prevent a state from making distinctions between citizens based on neutral criteria unrelated to the nature or status of their citizenship, for example, need. He was simply observing that the citizenship which the new amendment guarantees is not to be citizenship of a different or lesser quality than those claiming state citizenship without the protection of the Fourteenth Amendment.

The right of interstate migration's demand for equality of citizenship is clearly reflected in this Court's consistent rejection of the "contribution rationale" as a preferred basis for favoring long-term citizens over more recent arrivals. In *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969), the first case in which such a justification for differential treatment was offered, it was treated in the following strong terms:

> Appellant's reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

The Court repeated the above quotation from *Shapiro* in the next case in which the contribution rationale was offered, *Vlandis v. Kline*, 412 U.S. 441, 450 n. 6 (1973), and again in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 266 (1974), adding, "We rejected this 'contributory rationale' both in *Shapiro* and in *Vlandis v. Kline* . . ."

If, as appellants urge, the rights of interstate migration includes the right to full and undifferentiated citizenship, then Alaska's scheme classifying according to length of citizenship

violates both the right of interstate migration, itself, and the "fundamental rights" strand of equal protection. *See Dunn v. Blumstein*, 405 U.S. 330 (1972).

What this Court recognized in the *Slaughter-House Cases* and has consistently affirmed since is that the United States Constitution confers on all United States citizens the right to become a citizen of any state merely by establishing residency, *i.e.*, domicile in that state. *See Bradwell v. The State*, 83 U.S. (16 Wall.) 130, 138 (1873). Once citizenship is attained through residency, it is not partial, but full citizenship. All state owned resources are owned equally by all state citizens, no one citizen owning a larger share than any other. Should a state choose to distribute those resources based on the criterion of citizenship alone, as has Alaska, then each citizen is entitled to an equal share of the distribution.[2] As appellees acknowledge in their Brief, at 24, "qualification for participation in the dividend program is not need, *but the simple status of residency.*" (Emphasis added. See also *id.* at 28.)

Just as the equal protection clause directly forbids lawmakers from engaging in invidious discrimination, so also does the right to interstate migration directly forbid the State of Alaska from favoring its longer term citizens or residents over those who have more recently made their home there. The United States Constitution demands that Alaska recognize the full equality of all of its citizens.

As Justice Harlan stated, in dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), ". . . in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens . . . The humblest is the peer of the most powerful."

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[2]Appellants do not advocate any distribution scheme. They simply assert that the existing one is unconstitutional.